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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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BURLINGTON NORTHERN RAILROAD COMPANY,  
PETITIONER

v.

BLACKFEET TRIBE OF THE BLACKFEET  
INDIAN RESERVATION, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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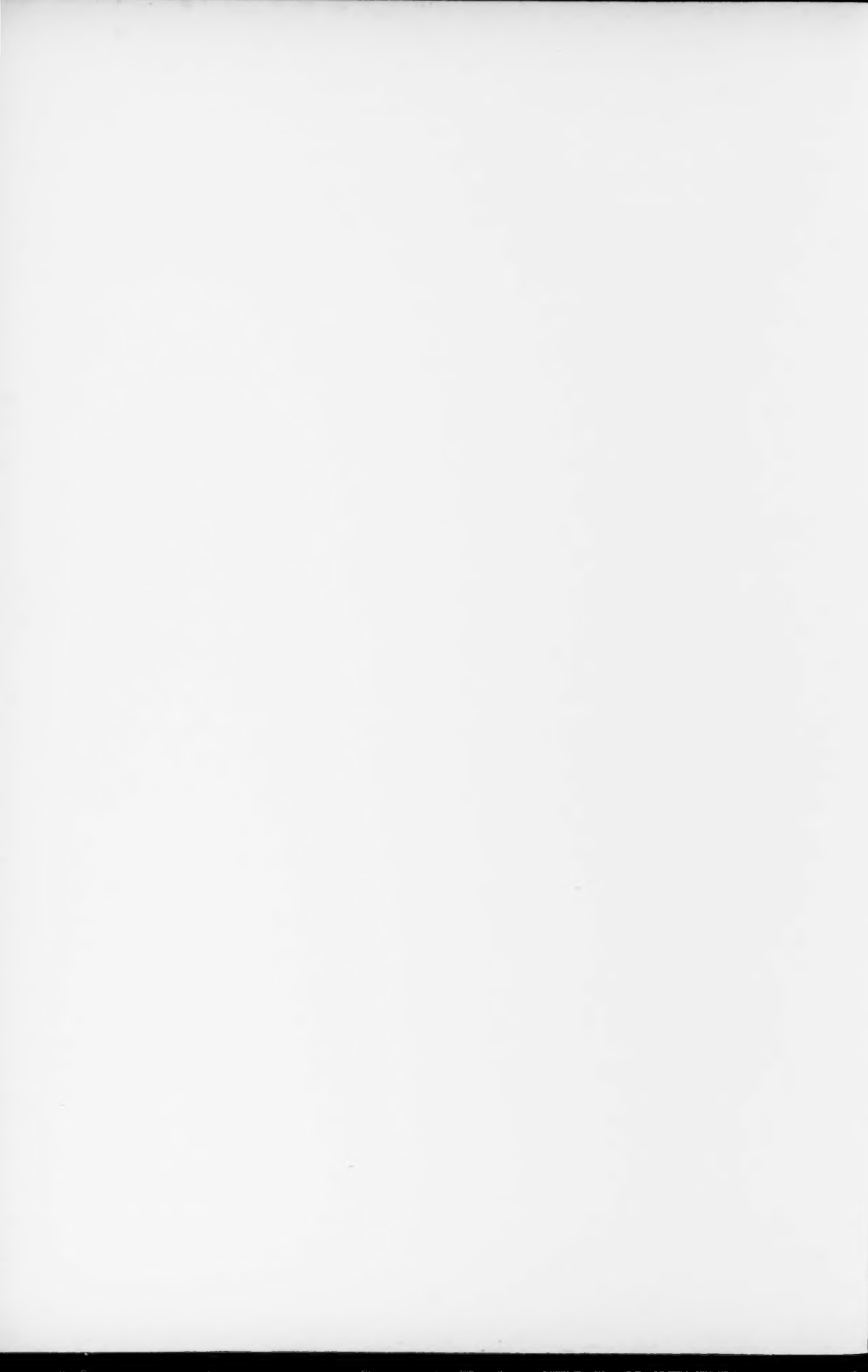
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### QUESTION PRESENTED

Whether an Indian tribe may tax the value of a railroad right of way that belongs to a nonmember, and that crosses tribal trust lands, only if the tribe has a consensual relationship with the nonmember.



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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

**STATEMENT**

This case concerns the authority of the respondent Indian Tribes to tax the value of railroad rights of way that cross reservation lands held in trust for the Tribes by the United States. Both courts below upheld the tribal taxes, relying primarily on this Court's decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Merrion*), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (*Colville*).

1. Petitioner, the Burlington Northern Railroad Company, operates the largest railroad system in the United States. 1991 *Moody's Transportation Manual* 1. In 1990, petitioner transported some 305 million tons of freight, including coal, grain, and industrial and forest products. *Id.* at 14. Those operations generated revenues in excess of \$4.6 billion. *Id.* at 4.

Petitioner succeeded to its main northern line from the St. Paul, Minneapolis, and Manitoba Railway Company. Br. in Support of Mot. for Prelim. Inj. in *Fort Peck* 5. See *The Official Railway Guide* B11, B23-B24 (November/December 1991). At issue here are two portions of the line: an 84-mile stretch across the Fort Peck Reservation, located in the northeastern part of the State and occupied by the Assiniboine and Sioux Tribes, and a 58.18-mile stretch across the Reservation of the Blackfeet Tribe, located in the northwestern part of the State. See *Fort Peck Br. in Opp.* 4; *Blackfeet Br. in Opp.* 1.

The land underlying these two stretches of track is held in trust for the Tribes by the United States. On each Reservation, the track is crossed by roads used by tribal members and nonmembers alike.<sup>1</sup> Petitioner's operations have sometimes caused fires and accidents along the rights of way. CR 16 in *Fort Peck*, Exh. 11, ¶ 11; CR 8 in *Blackfeet*, Att. 1, ¶ 11.

2. The Tribes' federally recognized interest in their Reservations dates back to 1855. In that year, the United States created, by treaty, one massive Reservation for the Blackfeet and other signatory Tribes. Treaty With the Blackfoot Indians, Oct. 17, 1855, 11 Stat. 657; see also Act of Apr. 15, 1874, ch. 96, 18 Stat. 28. Between 1886 and 1887, the Blackfeet, Assiniboine, and Sioux Tribes entered into an agreement with the United States to create separate Fort Peck and Blackfeet Reservations out of portions of the 1855 Reservation. Article VIII of that agreement (Pet. App. 55a) provided:

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<sup>1</sup> In 1986, 6536 members and 2315 nonmembers resided on the Blackfeet Reservation. Clerk's Record (CR) 8 in *Burlington Northern R.R. v. The Blackfeet Tribe, et al.*, No. CV-87-120-GF (D. Mont.), Att. 1, ¶ 4 (*Blackfeet*). In 1987, 5400 Indians resided on the Fort Peck Reservation, and nonmember residents numbered in the thousands. CR 16 in *Burlington Northern R.R. v. Fort Peck Tribal Executive Bd.*, No. CV-87-55-GF (D. Mont.), Exh. 11, ¶ 2 (*Fort Peck*). The two cases were considered together by the district court and consolidated by the court of appeals. Pet. App. 2a n.1.

[W]henever in the opinion of the President the public interests require the construction of railroads \* \* \* through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Congress ratified the agreement in the Act of May 1, 1888, ch. 213, 25 Stat. 113, 115-116 (Pet. App. 54a-56a).

After the Tribes signed the agreement, but before passage of the 1888 Act, Congress enacted separate legislation authorizing petitioner's predecessor-in-interest—the St. Paul, Minneapolis, and Manitoba Railway Company—to apply for a right of way through Indian reservation lands in a portion of northern Montana that included what is now the Fort Peck Reservation. Act of Feb. 15, 1887, ch. 130, 24 Stat. 402 (1887 Act). The 1887 Act required the company to compensate the Indians for the right of way, and provided that “[the] operation of [the] railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.” § 4, 24 Stat. 403.

In 1890, petitioner's predecessor obtained a right of way across the Fort Peck Reservation pursuant to the 1887 Act and a right of way across the Blackfeet Reservation pursuant to the 1888 Act. Pet. App. 21a, 24a-25a, 42a; Blackfeet Br. in Opp. 3 n.4.

3. The Fort Peck and Blackfeet Tribes enacted the taxes challenged here in 1986 and 1987. The Tribes concluded that their existing taxes (*e.g.*, on oil and gas production and timber harvesting) were insufficient, especially in light of decreased federal funding for tribal services, such as police and fire protection and emergency medical services. See CR 16 in *Fort Peck*, Exh. 11, ¶¶ 4-10, 13-18; CR 8 in *Blackfeet*, Att. 1, ¶¶ 2-4, 6-7. Both

tax laws were adopted following a period for public comment and were approved by the Secretary of the Interior, through the Bureau of Indian Affairs (BIA). CR 11 in *Fort Peck*, Exhs. 5, 6.<sup>2</sup>

The Fort Peck Tribes impose an *ad valorem* tax on all utility property on reservation trust land, except utility property valued at less than \$200,000 or owned by the Tribes or the United States. Pet. App. 57a-61a. Non-exempt utility property, which includes petitioner's right of way, is generally taxed at 3% of its assessed value. *Id.* at 58a. The value is "presumed to be equal to the full value per linear mile of the utility as assessed by the State of Montana." *Ibid.*; see Mont. Code Ann. §§ 15-23-201, 15-6-145 (1990). Taxpayers may, however, elect any other valuation method that is "reasonabl[e] and accurate[]." Pet. App. 59a.

The Blackfeet Tribe imposes a 4% "possessory interest tax" on the value of "any non-exempt interest in real property" on its Reservation, including interests "held under an easement or right-of-way." Pet. App. 64a-65a. The Blackfeet law exempts property used as a homesite, farm, or ranch; commercial property used in retail sales or service; and any government property (tribal, federal, state, or local) or utility property that exclusively serves the Reservation. *Id.* at 66a-67a. The value of a possessory interest is deemed to be its "market value [as] stated on the assessment books of the county assessor," *id.* at 65a, although, as under the Fort Peck law, the taxpayer may choose an alternative valuation method, *id.* at 66a.

4. Petitioner challenged the Fort Peck and Blackfeet taxes in the United States District Court for the District of Montana.<sup>3</sup> On cross-motions for summary judgment,

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<sup>2</sup> Each Tribe was required by its constitution to obtain the Secretary's approval of such tax measures. Fort Peck Const. Art. VII, § 3, CR 11 in *Fort Peck*, Exh. 3; Blackfeet Const. Art. VI, § 1(h).

<sup>3</sup> Both the Fort Peck and Blackfeet tax laws prescribe administrative review procedures and provide for subsequent review in tribal courts. Blackfeet Br. in Opp. App. 9-10; Mem. in Support of

the district court sustained the taxes. Pet. App. 16a-47a. It began by noting that “[petitioner] concedes, as it must, the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members.” *Id.* at 20a; see also *id.* at 18a-19a (citing *Merrion* and *Colville*). The court then held that the lands underlying petitioner’s rights of way are trust lands, rejecting petitioner’s argument that the Tribes’ property interests in the lands were extinguished by the 1887 and 1888 Acts. Pet. App. 24a-35a, 41a-47a. The court likewise rejected petitioner’s arguments that the Railroad Revitalization and Regulatory Reform Act (4R Act), 49 U.S.C. 11503 *et seq.*, abrogated the Tribes’ power to tax and that the tribal taxes violate the 4R Act’s ban on discriminatory state taxes (see 49 U.S.C. 11503(b)) and the Interstate Commerce Clause (Art. I, § 8, Cl. 8). Pet. App. 36a-40a.

5. The court of appeals affirmed. Pet. App. 1a-15a.<sup>4</sup> Like the district court, it began with the principle enunciated in *Merrion* and *Colville* that “the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” Pet. App. 6a (quoting *Merrion*, 455 U.S. at 137, and *Colville*, 447 U.S. at 152). Applying that

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Mot. to Dismiss in *Fort Peck*, Exh. 1, at 2-3, 8-12. Petitioner did not avail itself of those procedures, and respondents accordingly moved to dismiss petitioner’s actions for failure to exhaust tribal remedies. The district court denied the motions, and the court of appeals affirmed that ruling. Pet. App. 3a n.2. The exhaustion issue is not raised in this Court.

<sup>4</sup> As an initial matter, the court of appeals held that sovereign immunity required dismissal of petitioner’s claims against the tribal legislative and executive bodies. Pet. App. 4a, 15a. The court allowed the claims against tribal officials to stand, however, holding that sovereign immunity does not bar claims for prospective relief against tribal officials who have allegedly violated federal law. *Id.* at 5a. No issues of sovereign immunity are presented in this Court.

principle, the court of appeals rejected petitioner's arguments that the Fort Peck and Blackfeet taxes are invalid because "(A) the rights of way are not on trust lands, (B) [petitioner's] activities \* \* \* do not significantly involve the Tribes, and (C) the Tribes have been divested of their sovereign power to tax." Pet. App. 6a.

First, the court held that the challenged taxes do concern tribal trust lands. Pet. App. 6a-10a. It concluded that the Tribes' interests in the lands underlying the rights of way were not extinguished by the Acts of 1887 and 1888, because those Acts gave petitioner's predecessor "only an easement, and not a fee." *Id.* at 8a (quoting *Great Northern Ry. v. United States*, 315 U.S. 262, 271 (1942)) ; see also Pet. App. 10a.

Second, the court held that the Tribes have a "significant interest in the subject matter" over which they have asserted taxing authority, Pet. App. 10a (quoting *Colville*, 447 U.S. at 153), since "[petitioner's] activities involve use of tribal lands and \* \* \* [petitioner] is the recipient of tribal services," including "the intangible benefits of a civilized society, and the tangible benefits of police and fire protection." Pet. App. 10a (citation omitted). The court rejected petitioner's contention that its operations are not subject to tribal taxation because it has no "consensual relationship" with the Tribes and because its operations are controlled by state and federal, rather than tribal, authorities. "The relevant question," the court stated, "is \* \* \* whether [petitioner] receives benefits from the Tribes for which it may be taxed. The answer to that question is yes." *Id.* at 11a. In the alternative, the court held that the relationship between petitioner and the Tribes is consensual in nature because it arose when "the Tribes consented to railroad rights of way by joining in \* \* \* the agreement ratified by the Act of 1888 and [petitioner's predecessor] chose to run rail lines through the reservations by voluntarily applying for rights of way." *Id.* at 11a n.7.

Third, the court held that the Tribes have not been divested of their taxing authority, either by the legislation

creating their Reservations and granting the rights of way, or by the 4R Act. Pet. App. 11a-13a.<sup>5</sup>

### DISCUSSION

The court of appeals correctly held that the Fort Peck and Blackfeet taxes are within the scope of tribal taxing authority recognized by this Court's decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Contrary to the contentions of petitioner and its amici, *Merrion* and *Colville* are fully consistent with—and thus do not need to be “reconcil[ed]” with (Pet. 15)—*Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Neither *Montana* nor *Brendale*—which concerned tribal regulation of nonmembers' activities on fee lands—held that a consensual relationship must exist in order for an Indian tribe to exercise civil authority over nonmembers who conduct activities on Indian trust lands. And none of the four decisions suggests that this Court analyzes tribal tax laws under a framework different from the one used to analyze other types of civil law adopted by a tribe. We discern no tension among this Court's decisions nor any conflict among the lower courts on the question presented here. The petition for a writ of certiorari should therefore be denied.<sup>6</sup>

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<sup>5</sup> The court of appeals also rejected petitioner's contentions that the tribal taxes are barred by the provision in the 4R Act prohibiting discriminatory state taxes, Pet. App. 13a-14a, and by the Interstate Commerce Clause, *id.* at 14a-15a (discussing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-193 (1989)). Petitioner does not renew those claims in this Court.

<sup>6</sup> Although petitioner poses two questions at the outset of its petition (Pet. i), it discusses only the first question (whether tribal taxing authority over nonmembers depends on the existence of a consensual relationship) in the body of the petition. Petitioner does not discuss the second question (the effect, if any, that federal control over a taxpayer has on tribal taxing authority), although petitioner does claim that federal control is relevant to whether

1. This Court has long recognized that “the Indian tribes retain ‘attributes of sovereignty over both their members and their territory.’” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); see also *Williams v. Lee*, 358 U.S. 217, 223 (1959). The Court reaffirmed this very principle in two of the cases upon which petitioner chiefly relies. See *Montana v. United States*, 450 U.S. 544, 563 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). Among these attributes of sovereignty is the power of taxation. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985); *Merrion*, 455 U.S. at 137, 139; *Montana*, 450 U.S. at 565-566; *Colville*, 447 U.S. at 152-153; *Morris v. Hitchcock*, 194 U.S. 384, 391-392 (1904). Indeed, “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion*, 455 U.S. at 137; see *Kerr-McGee*, 471 U.S. at 201.

Because tribal authority extends both to tribal members and to tribal territory, it is not limited to members of the tribe. See *Montana*, 450 U.S. at 565-566; *Cardin v. De La Cruz*, 671 F.2d 363, 366 & n.3 (9th Cir), cert. denied, 459 U.S. 967 (1982). It includes as well the “authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter.” *Colville*, 447 U.S. at 153; see also *ibid.* (“Except where Congress has provided otherwise th[e] power [to tax] may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.”) (quoting, with emphasis, *Powers of Indian Tribes*, 55 Interior Dec. 14, 46 (1934)). Although that authority may be “divested \* \* \* by federal law or necessary implication of [a tribe’s] dependent status,” it is widely understood “that federal law to date has not

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a consensual relationship exists. Pet. 17-18; see also Pet. Reply Br. 7. We address that claim at note 15, *infra*.

worked a divestiture of Indian taxing power." *Colville*, 447 U.S. at 152; see *Merrion*, 455 U.S. at 149-152.

This Court most recently addressed tribal authority to tax economic activity by nonmembers on tribal trust lands in *Merrion*.<sup>7</sup> *Merrion* involved a challenge to a severance tax imposed by the Jicarilla Apache Tribe on oil and gas extracted from leased trust lands. 455 U.S. at 133, 135-136. In sustaining the tax, the Court declined to adopt the narrow view that tribal taxing authority is based solely on a tribe's power to exclude nonmembers from tribal land. Instead, the Court held that the taxing power "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.* at 137.<sup>8</sup>

The Court in *Merrion* relied to a significant extent on its earlier decision in *Colville*, which also upheld tribal authority to tax the activities of nonmembers on trust lands. In *Colville*, the Court reviewed an excise tax that the State of Washington imposed on cigarettes purchased by nonmembers on reservation trust lands. 447 U.S. at 141-142. Those purchases were also subject to tribal taxes. *Id.* at 144-145. Although the Court upheld the State's cigarette tax, it rejected the State's argument that the tribes lacked authority to impose their own cigarette taxes as well. The Court held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it

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<sup>7</sup> The Court's later decision in *Kerr-McGee* also concerned a tribal tax on nonmember activities on trust lands, but *Kerr-McGee* addressed only the question whether the tax had to be approved by the Secretary of the Interior. 471 U.S. at 198.

<sup>8</sup> The Court in *Merrion* also held, in the alternative, that the severance tax was a valid exercise of the tribe's power to exclude the lessees. 455 U.S. at 144-148.

by federal law or necessary implication of their dependent status." *Id.* at 152.

2. In reviewing the Fort Peck and Blackfeet taxes, the court of appeals properly applied this Court's holdings in *Merrion* and *Colville*. The court concluded that the Fort Peck and Blackfeet taxes are permissible exercises of tribal authority because (1) the lands underlying petitioner's rights of way are tribal trust lands; (2) petitioner receives both tangible and intangible benefits from the Tribes in connection with its operations on the rights of way; and (3) federal law has not divested the Tribes of their taxing power.

Petitioner does not challenge any of these conclusions in this Court. Instead, although petitioner accepted the *Merrion* and *Colville* test below, it now contends that the language in *Merrion* and *Colville* upon which the court of appeals relied cannot be reconciled with *Montana* and *Brendale*. Specifically, petitioner argues that the latter two decisions establish that a tribe may tax a non-member's activities—even on trust lands—only if there is a consensual relationship between the tribe and the taxpayer. Pet. 9, 10-16; Pet. Reply Br. 5.<sup>9</sup> A similar argument, however, was rejected in *Merrion*. Moreover, neither *Montana* nor *Brendale* adopted a consensual-relationship requirement for the exercise of tribal civil

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<sup>9</sup> In the court of appeals, petitioner initially acknowledged that a tribal tax on nonmember activities could be sustained on the basis of either a "consensual relationship" or a territorial nexus. Thus, petitioner's argument that a consensual relationship is necessary was based on its assertion that the Tribes retain no property interest in the lands underlying the rights of way. See 88-4429 Pet. C.A. Br. 20-21, 30, 32-34; 88-4429 Pet. C.A. Reply Br. 21-24; 88-4428 Pet. C.A. Br. 17-18, 26-27, 28-31; 88-4428 Pet. C.A. Reply Br. 21-24; see also, *e.g.*, Br. in Support of Mot. for Prelim. Inj. in *Blackfeet* 34-38; Concluding Br. of the Pltf. in *Blackfeet* 25-26. The quite different argument that petitioner advances in this Court—that a "consensual relationship" is required for *any* exercise by a tribe of civil authority over nonmembers, regardless of whether a territorial nexus exists—was first squarely presented to the court of appeals only in petitioner's petition for rehearing and suggestion of rehearing en banc.

authority over nonmembers on trust lands. Finally, petitioner is wrong in asserting that the *Merrion/Colville* analysis of tribal tax laws differs from the *Montana/Brendale* analysis of other types of tribal civil laws.

a. The Court in *Merrion* rejected the argument that the scope of a tribe's taxing authority over its trust lands must be determined by the terms of any contractual or other consensual relationship between the taxpayer and the tribe. The taxpayer in *Merrion* had argued that the tribe could not tax oil and gas produced under its leases with the tribe because the tribe had not reserved the right to impose such a tax in the lease agreements. The Court rejected that argument because it "confuse[d] the Tribe's role as commercial partner with its role as sovereign." 455 U.S. at 145. The Court also rejected the related notion that "the power to tax depends on the consent of the taxed," concluding that consent "has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *Id.* at 147.

Like the taxpayer in *Merrion*, petitioner confuses the Tribe's role as an entity capable of entering into commercial arrangements with its role as a sovereign. Petitioner asserts that a tribe may tax only those nonmembers with whom it has a "business relationship." Pet. 18. The Court in *Merrion* made clear, however, that a tribe's taxing power is not derived from commercial arrangements or "conditioned on the assent of [the] nonmember." 455 U.S. at 147.

b. To be sure, a consensual relationship is one form of "significant involv[ement]" (*Colville*, 447 U.S. at 152) that may support the exercise of a tribe's civil authority. That is the teaching of *Montana* and *Brendale*. Contrary to petitioner's contention (Pet. 8, 15-16), however, nothing in *Montana* or *Brendale* suggests that a consensual relationship is the exclusive basis for tribal regulation of nonmember activities on trust lands.

At issue in *Montana* was the authority of the Crow Tribe "to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-

Indians." 450 U.S. at 547. The Court "readily agree[d]" with the court of appeals' conclusion that the tribe could "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id.* at 557. The Court reached a different conclusion, however, with respect to the "power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Ibid.* The Court explained that, in light of the policy underlying the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751, by which certain reservation lands passed into fee status, "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." 450 U.S. at 560-561 n.9. The Court concluded that neither the Crow treaties nor the Tribe's inherent sovereignty was "so broad as to support the application of [the hunting and fishing regulation] to non-Indian lands." *Id.* at 563; see also *id.* at 559.

The Court in *Montana* emphasized, however, that even fee lands and non-Indian activities on such lands are not altogether immune from tribal regulation:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566 (citations omitted). This passage indicates that a "consensual relationship[]" may support the exercise of tribal authority "even on non-Indian fee lands." *Ibid.* The passage cannot be read, as petitioner would have it (Pet. 15), to mean that a consensual relationship is the *exclusive* basis for tribal authority over trust lands. Indeed, the Court made clear elsewhere in its opinion that a tribe's authority is broader over trust lands than over fee lands, 450 U.S. at 557, and the Court repeatedly stressed that its analysis and holding concerned the regulation of non-Indian activities on *fee* lands. *Id.* at 557, 563, 564, 565, 566; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983).

*Brendale* likewise recognized a distinction between trust and fee lands. In *Brendale*, the Court held that the Yakima Nation had authority to regulate use of fee lands in the "closed" area of its reservation, but not those in the "open" area. Although a plurality would have held, relying on *Montana*, that the Yakima Nation lacked authority over fee lands in both areas, it distinguished *Colville* primarily on the ground that *Colville* "did not involve the regulation of fee lands, as did *Montana*." 492 U.S. at 427. Moreover, the plurality made clear that its approach did not affect "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." *Ibid.* (quoting *Colville*, 447 U.S. at 152). Similarly, in his separate opinion, Justice Stevens took it as a given that the Yakima Nation "retain[ed] authority to regulate the use of trust land." 492 U.S. at 445.

c. Petitioner contends that *Merrion* and *Colville* have "cause[d] mischief" (Pet. Reply Br. 5) because they "suggest that tribal taxing authority" should be analyzed differently from "other exercises of sovereignty over non-members" (Pet. 9). That contention, however, rests on petitioner's erroneous view that, in analyzing non-tax laws, the Court in *Montana* and *Brendale* imposed a consensual-relationship requirement in all circumstances.

As explained above, neither *Montana* nor *Brendale* suggests that a consensual relationship is an absolute prerequisite for the exercise of tribal civil authority, especially on trust lands.

Moreover, petitioner is wrong in suggesting that *Merrion* and *Colville* reflect an approach to analyzing tribal tax laws that is different from the approach used in *Montana* and *Brendale* to analyze other types of tribal civil laws. In each of the four cases, the Court proceeded in a similar manner: It considered whether the tribe's inherent sovereignty or its power under treaties or other agreements with the United States provided a sufficient source of authority for the challenged law. The Court also inquired whether tribal powers were limited by legislation or divested by implication. *Brendale*, 492 U.S. at 422-432 (plurality opinion); *id.* at 441-447 (opinion of Stevens, J.); *id.* at 450-462 (opinion of Blackmun, J.); *Merrion*, 455 U.S. at 136-152; *Montana*, 450 U.S. at 557-566; *Colville*, 447 U.S. at 152-154. To be sure, under this approach, a tribe's authority to tax property and activities on trust lands may exceed its authority to impose other forms of regulation on fee lands. But that is merely a consequence of the historical and common-sense facts that Indian tribes have retained only some attributes of sovereignty (see *Montana*, 450 U.S. at 563); that Congress has limited certain tribal powers more than others (see *id.* at 557; *Colville*, 447 U.S. at 152); and that a tribe's nexus to a nonmember's activity may be stronger in some circumstances than in others. It is no basis for criticism that the validity of a tribal law may depend to a significant extent on the type and locus of regulation—*e.g.*, whether it is taxation or zoning, on trust or fee lands. Petitioner's attempt to obliterate the established distinction between Indian trust lands and non-Indian fee lands for these purposes ignores the "significant geographical component" of tribal sovereignty, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335 n.18 (quoting *White Mountain Apache Tribe*, 448 U.S. at 151), which embraces a tribe's "territory" as well as its "members." *Montana*, 450 U.S. at 563.

In sum, petitioner's criticism of the court of appeals' reliance on *Merrion* and *Colville* is misplaced.<sup>10</sup> The Fort Peck and Blackfeet taxes fall well within the scope of tribal taxing power under *Merrion* and *Colville*. Furthermore, there is no conflict between *Merrion* and *Colville* on the one hand, and *Montana* and *Brendale* on the other.<sup>11</sup> The decisions are entirely compatible, for the latter involved fee lands. Together, these decisions com-

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<sup>10</sup> Petitioner also errs in criticizing the court of appeals for failing adequately to consider the extent of the Tribes' power to exclude it from their Reservations. Pet. 16 n.12. The court of appeals did not consider that issue because petitioner did not raise it. Petitioner therefore should not be permitted to raise it in this Court. See, e.g., *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

<sup>11</sup> Nor is there a "state of confusion," as petitioner asserts (Pet. 11; see also Pet. Reply Br. 6), among the lower courts on the question whether a tribe may tax nonmember activities on trust lands in the absence of a consensual relationship. Two decisions cited by petitioner (Pet. 11 n.8) are inapposite. In *Navajo Communications Co. v. Navajo Tax Comm'n*, 18 Indian L. Rep. 6068 (Navajo Sup. Ct. 1991), a taxpayer unsuccessfully argued that it had been granted a waiver from a tribal tax. In *Atchison, Topeka & Santa Fe Ry. v. Deputy Area Director*, 93 Interior Dec. 79 (Bd. Indian App. 1986), the taxpayer unsuccessfully challenged the BIA's approval of a tribal tax, arguing that the approval violated the Administrative Procedure Act, the Fifth and Fourteenth Amendments, the Interstate Commerce Clause, and the 4R Act. The other decisions cited by petitioner are consistent with the decision below. In *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1320-1323 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984), the court relied on *Merrion* to uphold a tribal license fee on reservation business activities. In *Conoco, Inc. v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801, 801-802, 806-807 (D. Wyo. 1983), the court relied on *Merrion* and *Colville* to uphold a tribal severance tax on oil and gas produced from leased tribal trust lands. Finally, in *In re Protest Filed by Railbox Co., et al.*, Tribal Ct. Nos. CV-87-54, CV-87-55 & CV-87-56 (Dec. 14, 1990), slip op. 9-12, the Tribal Council of the Pueblo of Acoma upheld an *ad valorem* tax on railroad cars that crossed its Reservation, concluding that the Pueblo retains a property interest in the land underlying the railroad and that a consensual relationship exists between the railroad company and the Pueblo.

pel rejection of petitioner's unduly restrictive view of tribal taxing authority over trust lands.<sup>12</sup>

3. As the court of appeals correctly held (Pet. App. 11a n.7), even if a "consensual relationship" were necessary to sustain the exercise of tribal taxing authority in a case such as this, that requirement is satisfied here.<sup>13</sup> That alternative holding does not warrant review, because it was based on the specific facts, legislation, and executive agreement under which petitioner's predecessor obtained the rights of way across the Fort Peck and Blackfeet Reservations.

In any event, petitioner's challenge to the court's holding lacks merit. Petitioner asserts that the court erroneously relied on the fact that "100 years ago [petitioner's and the Tribes'] predecessors contracted independently with the same third party." Pet. 19.<sup>14</sup> That assertion obscures the relevant facts. The "third party" to which petitioner refers was the United States, which was acting in its capacity as a trustee for the Tribes when it granted the rights of way. Moreover, the rights of way that petitioner's predecessor sought and obtained were consented to by the Tribes themselves in the agreement that Congress ratified in the 1888 Act. Finally, the 1887 Act providing for the right of way through what became the Fort Peck Reservation required that the railroad be

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<sup>12</sup> This case presents no occasion for addressing petitioner's concern (Pet. 10, 28-29) that the Blackfeet tax might apply to some lands owned in fee by nonmembers. No fee lands are at issue in this case.

<sup>13</sup> The district court made no finding on the issue whether a consensual relationship existed because in the district court, petitioner "concede[d] \* \* \* the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members." Pet. App. 20a. Petitioner primarily argued that its rights of way were not on trust lands. See, e.g., Br. in Support of Mot. for Prelim. Inj. in *Blackfeet* 14-19; Concluding Br. of the Pltf. in *Blackfeet* 19-23. Petitioner does not press that argument here.

<sup>14</sup> The United States acted on behalf of the Tribes that are before the Court, not any tribal "predecessors."

operated "with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make," § 4, 24 Stat. 403, and the agreement ratified by the 1888 Act similarly provided that the railroad would be subject to "such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe," Art. VIII, 25 Stat. 115-116. Thus, by applying for rights of way pursuant to those enactments, petitioner's predecessor acknowledged the continuing interest of the Indians in the operation of the railroad across tribal trust lands, and voluntarily bound itself to an arrangement not only with the United States, but also with the Tribes.

Petitioner nonetheless asserts (Pet. Reply Br. 6 & n.6) that it is not in privity of contract with the Tribes. That assertion, even if correct, is irrelevant. This Court has never suggested that only a formal contract can create a "consensual relationship[]" sufficient to support tribal taxing authority. See *Montana*, 450 U.S. at 565. Indeed, petitioner itself recognizes that looser arrangements may qualify as "consensual relationships." See Pet. 14 (finding it "apparent" that nonmembers who voluntarily enter a reservation to buy cigarettes have entered into a "consensual relationship"). Thus, assuming *arguendo* that a consensual relationship provides the exclusive basis for tribal taxation of nonmembers, the absence of a formal contract between petitioner and the Tribes would not condemn the tribal taxes.<sup>15</sup> In any event, for present pur-

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<sup>15</sup> Contrary to petitioner's contention (Pet. 9; see also Pet. 18, 24; Pet. Reply Br. 8), the fact that petitioner cannot move or abandon its rights of way without federal approval is likewise irrelevant to the existence of a consensual relationship. The non-member taxpayers in *Kerr-McGee* were similarly subject to "comprehensive [federal] regulations governing the operation of oil and gas leases." 471 U.S. at 199 (citing 25 C.F.R. Pt. 211 (1984)). Those regulations required the taxpayer-lessees to obtain federal approval before commencing or abandoning lease operations. See 25 C.F.R. 211.20, 211.27. The fact that the lessees were subject to extensive federal regulation did not affect the fact that their leases with the tribes constituted "consensual relationships." Petitioner itself acknowledges as much when it describes *Kerr-McGee* as in-

poses, the consensual relationship between petitioner's predecessor and the trustee (the United States), which acted on behalf of the beneficiaries (the Tribes), places petitioner in privity with the beneficiaries as well. *Cf. Nevada v. United States*, 463 U.S. 110, 135, 141-142 (1983).

4. Petitioner and its amici contend that the court of appeals erred in concluding that petitioner's operations "significantly involved" the Tribes and their members. Pet. 21; see also States Amicus Br. 14; Ass'n of American R.R. Amicus Br. 16 n.11. That contention does not warrant further review.

Contrary to petitioner's contention (Pet. 21), the court of appeals' conclusion was not based solely on the fact that petitioner operates, and therefore has a substantial physical presence, on trust lands. The court of appeals also relied on petitioner's receipt of tribal services, including "the intangible benefits of a civilized society, and the tangible benefits of police and fire protection." Pet. App. 10a (citation omitted). Compare *Cotton Petroleum*, 490 U.S. at 189-191. The court's analysis was thus faithful to the principle that tribes retain "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." *Colville*, 447 U.S. at 152.

Moreover, petitioner understates the impact of its railroad operations on the Tribes and their members. Even with appropriate precautions, railroad operations are inherently dangerous. See, e.g., *Petition for Cert. in Burlington Northern R.R. v. Ford*, No. 91-779, Apps. E, F (argued Apr. 20, 1992) (88 accident claims by employees currently pending against Burlington Northern in Montana state courts alone). The trains that cross the Reservations travel at significant speeds and frequently carry hazardous materials. See *1991 Moody's Transportation Manual* 14 (product listing). Because of the potential for accidents to cause a release of hazardous materials, the

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volving consensual relationships between the tribe and the taxpayer. Pet. 14-15.

Tribes are required to develop emergency response plans under the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 11001-11050. See 40 C.F.R. Pt. 355 (1991). In addition, other types of accidents and fires have occurred along petitioner's rights of way, requiring tribal expenditures for police and firefighting services. See CR 16 in *Fort Peck*, Exh. 11, ¶ 11; CR 8 in *Blackfeet*, Att. 1, ¶ 11.<sup>16</sup>

The tribal taxes at issue here reflect legitimate efforts by a government to defray the costs of services made necessary by a taxpayer's presence and activities within its jurisdiction. In this respect, the Tribes' taxes are, like the tax at issue in *Merrion*, similar to those imposed by "[n]umerous other governmental entities." 445 U.S. at 138. State taxes on the value of railroad property abound, having been upheld by this Court since the last century. See *Adams Express Co. v. Ohio*, 165 U.S. 194, 220 (1897); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Thomson v. Pacific R.R.*, 76 U.S. (9 Wall.) 579 (1870). Montana, for example, levies an ad valorem property tax on railroad rights of way and other commercial property. Mont. Code Ann. §§ 15-6-101, 15-6-145 (1990). "Under these circumstances, there is nothing exceptional in requiring petitioner[] to contribute through taxes to the general cost of tribal government." *Merrion*, 445 U.S. at 137-138.

5. Petitioner (Pet. 22-30; Pet. Reply Br. 8-10) and its amici (see, e.g., Ass'n of American R.R. Br. 2, 4-8) advance several policy reasons why this Court should adopt a rule requiring that a consensual relationship exist before a tribe may tax nonmembers. Petitioner and its amici are particularly concerned about the potential for unrestricted and discriminatory taxation by tribes. With-

<sup>16</sup> Petitioner reimburses the BIA, not the Tribes, for BIA's direct, out-of-pocket costs of fire suppression caused by the railroad. Contrary to petitioner's suggestion (Pet. Reply Br. 8 n.8), petitioner does not otherwise support tribal fire, police, or medical services, or the hazardous substance emergency planning that is made necessary, in part, by trains crossing reservation trust lands.

out minimizing the possible importance of that concern if tribal taxes (either alone or when added to state taxes) should prove unduly burdensome, it does not furnish a basis for further review here.

The courts below did not address whether the tribal taxes challenged here are excessive or discriminatory. Nor do we. The proper forum for presentation of such arguments is Congress, which, in passing the 4R Act, has prohibited imposition of certain discriminatory taxes by States, but not by Indian tribes. Congress alone is in a position to balance the interests of the tribes in raising revenues by taxing property and activities on trust lands against the impact such taxes might have on the maintenance of a national rail network. The Court should decline petitioner's attempt to circumvent the political process and to have the judiciary address its concerns indirectly—namely, by importing a novel and narrowly defined “consensual relationship” requirement into the body of law governing a tribe's sovereign authority over trust lands on its reservation. “If [petitioner] believes that the objectives of the [4R Act's nondiscrimination provision] are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.” *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 692 (1992); cf. *Quill Corp. v. North Dakota*, No. 91-194 (May 26, 1992).

## CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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